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NO. 84-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD WALTERS AND RONALD SCHINK,
Petitioners,

v.

FLOYD SPRUYTTE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Louis J. Caruso*
Solicitor General

Thomas C. Nelson
Brian W. MacKenzie
Assistant Attorneys General

761 Law Building
Lansing, MI 48913

Telephone: (517) 373-1124

*Counsel of Record

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68 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does a State Administrative Rule which allows prison inmates to receive publications subject to the security determinations of prison administrators create a constitutionally protected interest.

II. Does failure to comply with a State Administrative Rule promulgation requirement present a Federal constitutional question.

III. Does the Eleventh Amendment bar a Federal action against State Officials sued in their individual capacity, for allegedly implementing an official policy claimed to be invalid as a matter of State Law.

IV. Whether State Officials who perform adjudicatory functions in connection with the determinations of prisoner property rights possess absolute immunity.

TABLE OF CONTENTS

PAGE NOS.

Questions Presented for Review i

Index of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Statutes, Administrative Rules, Policy Directives and Court Rules Involved 2

Statement of the Case 5

Reasons for Granting the Writ:

I. The Court of Appeals decision in this case that the language of the State Administrative Rule created a constitutionally protected interest conflicts with decisions of other circuits and presents an important question of Federal Law with respect to the proper interpretation of *Hewitt* v. *Helms,* 459 US 460 (1983) and *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex,* 442 US 1 (1979) 6

II. This case presents a significant question of Federal Law with regard to the interpretation of *Hewitt* v. *Helms,* 459 US 460 (1983) where the Court of Appeals effectively based a constitutional violation of non-compliance with State Law procedures 8

II. The decision of the Court of Appeals in this case presents an important Federal question with respect to interpretation of *Pennhurst State School & Hospital* v. *Halderman,* 104 S. Ct. 900 (1984) 10

IV. The case presents an important Federal question with respect to the appropriate standard for determining immunity of government officials involved in adjudicatory functions 12

Conclusion 14

INDEX OF AUTHORITIES

Cases	PAGE NOS.
Baumann v. *Arizona Department of Corrections*, 754 F2d 841, 844 (9th Cir. 1985)	8
Bills v. *Henderson*, 631 F2d 1287 (6th Cir. 1980)	9
Davis v. *Scherer*, 104 S. Ct. 3012 (1984)	13
Greenholtz v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 US 1 (1979)	6, 8
Harlow v. Fitzgerald, 457 US 800 (1982)	13
Hewitt v. *Helms*, 459 US 460 (1983)	6, 7, 8, 9
Hillary v. *Rushen*, 726 F2d 1132 (9th Cir. 1983)	12
Jihaad v. *O'Brien*, 645 F2d 556, 564 (6th Cir. 1981)	13
Milton v. Nelson, 527 F2d 458, 1160 (9th Cir. 1975)	13
Olim v. *Wakinekona*, 461 US 238 (1983)	7, 8
Pennhurst State School & Hospital v. *Halderman*, —— US —— 104 S. Ct. 900, 917; 79 L Ed2d 67 (1984)	9, 11, 12
Procunier v. *Martinez*, 416 US 396 (1974)	7
Saxner v. Benson, 727 F2d 669 (7th Cir. 1983), cert. granted sub. nom. *Cleavinger* v. *Saxner*, 105 S. Ct. 1166 (1985)	13
Scheuer v. *Rhodes*, 416 US 232 (1974)	12
Shango v. *Jurich*, 681 F2d 1091, 1101 (7th Cir. 1982)	11
Spruytte v. *Walters*, 753 F2d 498 (6th Cir. 1985)	2, 6, 9, 11, 13
Sullivan v. *Ford*, 609 F2d 195 (5th Cir.), cert. denied 745 US 969 (1980)	10

Other: **PAGE NOS.**

42 US 1983 ..... 1, 2

42 USC 1915(d) 1, 2, 3

FRCP 59(e) 1

28 USC 1254(1) 2, 3

US Const. Amend. XI 3

US Const. Amend. XIV 3

MCL 24.201, *et seq;* MSA 3.560(101) 9

MCL 24.207 ..... 3, 4

MCL 24.224 ..... 4, 5

Statement Administrative Rule 791.6603(3) 6

Department of Corrections Policy Directive PD-BCF-63.03 dated April 15, 1982 ..... 6, 9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

On July 30, 1982, Plaintiff-Respondent, (hereinafter "Respondent") filed an *in forma pauperis* complaint pursuant to 42 USC 1983. By *sua sponte* Opinion and Order dated August 11, 1982, the Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, dismissed Plaintiff's civil rights complaint pursuant to 42 USC 1915(d). Docket No. M82-142CA, Appendix Page 1a. As a result, Defendants were not served with Respondent's complaint, nor did they file a responsive pleading in the District Court. A Motion for Reconsideration of the above Judgment, which was treated as a Motion to Alter or Amend a Judgment under the FRCP(e), was subsequently denied as untimely. See Order dated September 14, 1982. Appendix Page 8a. On Respondent's appeal, the United States Court of Appeals for the Sixth Circuit reversed the District Court's Summary Dismissal and remanded the case for further proceedings.

Spruytte v. *Walters*, 753 F2d 498 (6th Cir. 1985). Appendix Page 10a. Thereafter, Defendants-Petitioners' (hereinafter "Petitioners") Application for Rehearing and Suggestion for Rehearing en *Banc* was denied by Order dated March 27, 1985. Appendix Page 46a.

JURISDICTION

Petitioner seeks review of the Court of Appeals Opinion filed in this cause on January 28, 1985. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ADMINISTRATIVE RULES, POLICY DIRECTIVES AND COURT RULES INVOLVED

42 USC 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the Distirct of Columbia.

28 USC 1915(d):

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the

case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

US Const. Amend. XIV:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Const. Amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

MCL 24.207:

> Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the amendment, suspension or rescission thereof, but does not include the following:
>
> (a) A resolution or order of the state administrative board.
>
> (b) A formal opinion of the attorney general.
>
> (c) A rule or order establishing or fixing rates or tarrifs.

(d) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, as amended, being sections 300.1 to 300.5 of the Compiled Laws of 1948, Act No. 165 of the Public Acts of 1929, as amended, being sections 301.1 to 306.3 of the Compiled Laws of 1948 and Act No. 286 of the Public Acts of 1929, as amended, being sections 311.1 to 315.2 of the Compiled Laws of 1948.

(e) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.

(f) A determination, decision or order in a contested case.

(g) An intergovernmental, interagency or intraagency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to, the public.

(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.

(i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby.

MCL 24.224:

Sec. 24 (1) Before *the* adoption of a guideline, an agency shall give notice of the proposed guideline to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and • • • *each person who* requested the agency in writing for advance

notice of proposed action which may affect *the person*. The notice shall be given by mail • • •, in writing, to the last address specified by the person. A request for notice is renewable each December.

(2) The notice required by subsection (1) shall include *all of the following*:

(a) A statement of the terms or substance of the proposed guideline, a description of the subjects and issues involved, and the proposed effective date of the guideline.

(b) A statement that the addressee may express any views or arguments regarding the proposed guideline or *the guideline's* effect on *a* person.

(c) The address to which written comments *may* be sent and the date by which comments *shall* be mailed, which date shall not be less than *60* days from the date of the mailing of the notice.

(d) A reference to the specific statutory provision • • • about which the proposed guideline • • • *states* a policy.

STATEMENT OF THE CASE

The Complaint in this cause alleged that on May 26, 1982, Respondent was denied receipt of a dictionary mailed to him by his mother for the reason that the book did not come directly from a publisher or supplier. The Complaint further alleged that Plaintiff was advised that he could request an administrative hearing on the matter and that he, therefore, requested a hearing and a staff assistant to assist him. The administrative hearing was held on June 10, 1982. At the hearing, the complaint alleges that the staff assistant did not

produce a copy of a previously requested state Circuit Court decision which purportedly supported Respondent's entitlement to the book in question. The complaint further recites that the hearing officer rejected Respondent's claim that State Administrative Rule 791.660(3) entitled Respondent to receipt of the book, and instead ruled that a Department of Corrections Policy Directive (PD-BCF-63.03 dated April 15, 1982) required that all books come directly from publishers or suppliers. Pursuant to this ruling, it appears that the book was returned to the sender at Respondent's expense.

On appeal from the Summary Dismissal of Respondent's complaint, the Sixth Circuit reached the merits of Petitioners' allegations and held that the complaint not only stated a claim, but that prison officials were not entitled to qualified immunity. *Spruytte* v. *Walters*, 753 F2d 498 (6th Cir. 1985).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION IN THIS CASE THAT THE LANGUAGE OF THE STATE ADMINISTRATIVE RULE CREATED A CONSTITUTIONALLY PROTECTED INTEREST CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WITH RESPECT TO THE PROPER INTERPRETATION OF HEWITT v. HELMS, 459 US 460 (1983)

AND

GREENHOLTZ v. INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, 442 US 1 (1979)

The Court of Appeals panel in this case held that Michigan Administrative Rule 791.6603(3) vested inmates with a con-

stitutionally protected right to receive any book from any source unless prison officials determined that the book in question posed a threat to the security or order of the prison. *Spruytte* v. *Walters,* 753 F2d 498, 507 (6th Cir. 1985). The panel reached this conclusion after exploration of the "atmospherics" which they discerned in *Hewitt* v. *Helms,* 459 US 460 (1983) and *Olim* v. *Wakinekona,* 461 US 238 (1983).

The applicable language of the Rule at issue reads as follows:

> A resident may receive any book, periodical, or other publication which does not present a threat to the order or security of the institution or to resident rehabilitation.

The Rule does not purport to define threats to security or resident rehabilitation. Such matters are clearly left to the sound discretion of prison administrators. The Rule also does not address the procedures and methods for acquisition of books or printed materials. Finally, there is nothing in the Rule that provides the right to receive books from any *source.*

The Rule thus merely recognizes and embodies the constitutional standard that prohibits inmate mail censorship except in furtherance of security, order or rehabilitation. *Procunier* v. *Martinez,* 416 US 396 (1974). It creates no additional rights in the inmate and leaves broad discretion in prison administrators to adopt procedures and restrictions in accordance with the above legitimate objectives. In short, there is nothing in this Rule that prohibits prison officials from limiting or otherwise regulating the receipt of books for any constitutionally permissible reason. See *Olim* v. *Wakinekona,* 461 US 283, 249 (1983).

It is Petitioners' position that State creation of a federally-protected interest by means of administrative regulation re-

quires *mandatory* and *precise* substantive limitations on the official discretion of the decision-maker in addition to existing constitutional restraints. In *Hewitt* v. *Helms, supra,* for example, this Court found that the State's use of "unmistakably mandatory" language in conjunction with specified substantive predicates created such an interest. Id. at 471-472. Likewise, in *Baumann* v. *Airzona Department of Corrections,* 754 F2d 841, 844 (9th Cir. 1985), the Ninth Circuit Court of Appeals concluded that the absence of a "shall/unless" formula in the state's scheme for parole release precluded a finding of a protected entitlement. The *Baumann* Court concluded that this formulation had been decisive in *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex,* 442 US 1 (1979) and further noted that this interpretation was the majority view. Id. at 844

The Court of Appeals in this case simply ignored the significance of the discretionary word "may" used in the Rule at issue. Their finding of a protected interest is contrary to a plain reading and clear meaning of the rule resulting in conflict with the decisions of this Court and those in other circuits.

For the above reasons, Petitioners submit that this Court should grant certiorari to resolve the above conflict in light of *Hewitt, Olim* and *Greenholtz.*

II.

THIS CASE PRESENTS A SIGNIFICANT QUESTION OF FEDERAL LAW WITH REGARD TO THE INTERPRETATION OF HEWITT v. HELMS, 459 US 460 (1983) WHERE THE COURT OF APPEALS EFFECTIVELY BASED A CONSTITUTIONAL VIOLATION ON NON-COMPLIANCE WITH STATE LAW PROCEDURES

Petitioners submit that the Opinion below elevated alleged non-compliance with a state procedural requirement to the

level of a constitutional violation under the guise of a liberty interest analysis.

The Court of Appeals found that Respondent had been denied receipt of a book pursuant to a Michigan Department of Corrections Policy Directive which required such material to come directly from authorized vendors or publishers (Policy Directive PD-BCF-63.03). The Court of Appeals had no quarrel with the validity of such restrictions as a matter of Federal Constitutional Law. *Spruytte* v. *Walters, supra,* 753 F2d at 504-505. Instead, the panel majority concluded that the Department of Corrections adoption of this requirement by way of a "guideline" as opposed to a "rule" had not complied with the Michigan Administrative Procedures Act.[1] MCL 24.201, *et seq;* MSA 3.560(101). Despite the fact that Respondent had received notice and a hearing prior to the return of the book in question, the Court of Appeals then held that the application of this restriction violated Respondent's due process rights.

A failure to follow state procedural rules does not in itself implicate constitutional interests. In this regard, the decision below conflicts with *Bills* v. *Henderson,* 631 F2d 1287 (6th Cir. 1980) and *Hewitt* v. *Helms,* 459 US 460 (1983).

This Court in *Pennhurst State School & Hospital* v. *Halderman,* —— US —— 104 S. Ct. 900, 917; 79 L Ed2d 67 (1984) cautioned that ". . . it is difficult to think of a greater intru-

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[1]

The Michigan Supreme Court has recently granted leave to appeal to decide whether prisoners are members of the public for purposes of rule promulgation under the Michigan Administrative Procedures Act. *Martin* v. *Michigan Department of Corrections,* —— *Mich App* —— (Court of Appeals Docket No. 71040); *Kirkeby* v. *Michigan Department of Corrections,* —— *Mich App* —— (Court of Appeal Docket No. 75948.)

sion on state sovereignty than when a Federal Court instructs State Officials on how to conform their conduct to State Law." Here the Court of Appeals held that a prison "publisher-only" restriction should have been promulgated in accordance with procedural requirement embodied in State Law. The Court did *not* find that Respondent lacked notice of the Rule; that it was wrongly applied in his case; or that it was arbitrary, unreasonable or violative of the Federal Constitution. See *Sullivan* v. *Ford*, 609 F2d 195 (5th Cir.), cert. denied 745 US 969 (1980). Nor did the Court identify any constitutional significance in the differences between State procedures for adoption of "guidelines" and "rules."[2]

The Court of Appeals then erroneously viewed the state process for rule enactment as a substantive end in itself.[3] Their focus on state procedural law obscures Federal Con-

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[2]

Due to the procedural posture of this case, Petitioners did not have an opportunity to prove that the Policy Directive at issue had been adopted as a guideline in accordance with MCL 24.224, *et seq*; MSA 3.560(124), *et seq*, under the Michigan Administrative Procedures Act. See Appendix Page 47a attached Affidavit of Kevin Foram, Legal Counsel for the Legislative Service Bureau.

[3]

Petitioner below argued that the Policy Directive at issue was a proper interpretive guideline under State Law, MCL 24.207(h); MSA 3.560(107)(h). See *Michigan Farm Bureau* v. *Bureau of Workmen's Compensation*, 408 Mich 141; 289 NW2d 699 (1980), and thus exempt from full notice and hearing requirements under the State Administrative Procedures Act. With respect to the Federal Administrative Procedures Act, this Court has firmly rejected the concept that Courts may require more procedural devices than determined necessary by the agency in question. *Vermont Yankee Nuclear Power Corporation* v. *NRDC*, 435 US 519, 547 (1978). As stated in this case: "This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings."

stitutional requirements. Such approach effectively constitutionalizes the state procedural right and ". . . stand[s] any due process analysis on its head." *Shango* v. *Jurich*, 681 F2d 1091, 1101 (7th Cir. 1982).

This Court should grant certiorari to clarify the authority of the Federal Courts to provide remedies for alleged violation of state procedural requirements.

III.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION WITH RESPECT TO INTERPRETATION OF PENNHURST STATE SCHOOL & HOSPITAL v. HALDERMAN, 104 S. Ct. 900 (1984)

The Court of Appeals in this case, ruled that the Eleventh Amendment did not bar Federal Court jurisdiction because Defendant State Officials had been sued in their individual capacities. *Spruytte* v. *Walters, supra,* 753 F2d 512-514. Petitioners submit that this ruling represents a misinterpretation of *Pennhurst State School & Hospital* v. *Halderman, supra.*

In *Pennhurst,* this Court stated that ". . . a claim that State Officials violated State Law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. . . ." This Court went on to hold that ". . . this principle applies as well to State-Law Claims brought in the Federal Court under pendent jurisdiction."

Here there is no claim that Defendants State Officials, were responsible for the adoption of the State regulation at issue. Instead the claim was simply that they had followed a procedurally invalid restriction in the discharge of their official responsibilities.

Respondent's claim, therefore, required the Court to determine whether the restriction in question had been adopted in accordance with state procedural law. Petitioners submit that this clearly represents a pendent state law claim, see *Hillary* v. *Rushen*, 725 F2d 1132 (9th Cir. 1983), that is barred by *Pennhurst*.

The fact that suit in these circumstances is brought against individual State Officials in their individual capacity should not eliminate the Eleventh Amendment bar to suit in Federal Court. When such individuals enforced a policy within the scope of their authority, they were acting solely on behalf of the state. Absent an allegation that they abused the powers of their office, *Scheuer* v. *Rhodes*, 416 US 232 (1974) or otherwise active in *ultra vires* fashion, *Pennhurst* v. *Halderman*, *supra*, the Eleventh Amendment should operate as a bar to retrospective relief. To hold otherwise, as this Court noted in *Pennhurst*, would give the Eleventh Amendment "force only in a rare case in which the Plaintiff foolishly attempts to sue the State in its own name."

This Court should grant certiorari to decide whether a suit in Federal Court against State Defendants alleged to have acted in their individual capacity is sufficient in the above circumstances to avoid the Eleventh Amendment.

IV.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION WITH RESPECT TO THE APPROPRIATE STANDARD FOR DETERMINING IMMUNITY OF GOVERNMENT OFFICIALS INVOLVED IN ADJUDICATORY FUNCTIONS

The Sixth Circuit Court of Appeals in this case held that prison officials who conduct administrative hearings are entitled only to good faith immunity. *Jihaad* v. *O'Brien*, 645 F2d 556, 564 (6th Cir. 1981). *Spruytte* v. *Walters, supra*, 753 F2d at 510. The Court then found that, due to the absence of a valid publisher-only rule, the State Officials had violated a clearly established State regulation allowing receipt of any non-threatening book. The officials, therefore, were not entitled to good faith immunity under the test set forth by this Court's decisions in *Harlow* v. *Fitzgerald*, 457 US 800 (1982) and *Davis* v. *Scherer*, 104 S. Ct. 3012 (1984).

As an initial matter, Petitioners submit that there is a conflict in the circuits with respect to whether officials who perform adjudicatory functions are entitled to qualified or absolute immunity. Certiorari has been granted to resolve this question. *Saxner* v. *Benson*, 727 F2d 669 (7th Cir. 1984), cert. granted sub. nom. *Cleavinger* v. *Saxner*, 105 S. Ct. 1166 (1985).

In any event, Petitioners submit that enforcement of regulations later found to be invalid does not deprive a Defendant of good faith immunity. *Milton* v. *Nelson*, 527 F2d 458, 1160 (9th Cir. 1975). In this case, there was no clear authority under Michigan law to the effect that the policy directive restricting receipt of publications was constitutionally or statutorily invalid. Moreover, given the fact that publisher-only

restrictions have been upheld by Federal Courts, it cannot be said that the constitutional invalidity of the restriction was clearly established at the time of its enforcement in this case.

This Court should, therefore, grant certiorari to address the question of official immunity in these circumstances.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso*
Solicitor General

Thomas C. Nelson
Brian W. MacKenzie
Assistant Attorneys General

Business Address:

761 Law Building
Lansing, MI 48913

Telephone: (517) 373-1124

*Counsel of Record

DATED:

APPENDIX

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION

FLOYD SPRUYTTE, Plaintiff v. RICHARD WALTERS, Psychologist, MIPC, and RONALD SCHINK, Psychologist, MIPC, Defendants	No. M82-142 CA

OPINION

This is a civil rights action filed pursuant to 42 U.S.C. §§ 1983 and 1988 by an inmate at the Michigan Intensive Program Center at Marquette, Michigan, against two psychologists at that institution.

Plaintiff's rather lengthy complaint involves the prison's "publisher only" rule and an administrative hearing involving the rule. The defendants apparently were the hearing officers who conducted the hearing. Reduced to its essentials, the complaint alleges the following pertinent facts.

The Michigan Department of Corrections has a "publisher only" rule which requires that books and other publications sent to inmates must be received directly from authorized vendors or publishers. Policy Directive PD-BCF-63.03, "Mail Policy," April 15, 1982. On May 26, 1982, plaintiff received from the prison officials a "notice of package rejection" which advised him that a book mailed to him by one Norma Spruytte

could not be delivered to him because of the "publisher only" rule. He was also advised that he could request an administrative hearing with respect to the matter.

Plaintiff requested a hearing and a staff assistant to assist him. A staff assistant was assigned who interviewed plaintiff on June 2, 1982. Plaintiff alleges that he told the staff assistant that "the rule had been litigated" in the Marquette County Circuit Court in a case entitled *Mithrander v. Michigan Department of Corrections*, and that under the court's ruling he was entitled to receive the book. He asked the staff assistant to procure copies of the court's ruling to present at the administrative hearing.

On June 10, 1982, plaintiff was advised by the staff assistant that he had been instructed to bring plaintiff to the hearing. Plaintiff asked the staff assistant if he had secured a copy of the state court decision. The assistant stated that he had not because it was the plaintiff's responsibility to obtain the decision. Thereupon, plaintiff appeared before the defendants who conducted the hearing.

At the hearing, plaintiff argued that the "publisher only" rule was invalid. He alleges that he "cited both federal and state court holdings on the subject giving special attention to the recent Marquette Circuit Court interpretation of the rule." (Complaint, par. 15). Plaintiff also requested an adjournment to enable him to obtain a copy of the circuit court decision for the hearing officers. The defendants refused plaintiff's request for an adjournment, and also rejected his attack on the validity of the "publisher only" rule. They held that the rule was valid, and that the delivery of the book in question was properly withheld. The book was returned to the sender at plaintiff's expense.

Plaintiff now claims that the conduct of the administrative hearing and the facts surrounding it violated his constitutional rights to due process and a fair hearing. He seeks declaratory and injunctive relief as well as compensatory and punitive damages. Accepting the truth of the material allegations of the complaint, the court concludes that it fails to state a claim for relief in this court. Moreover, in view of the specificity with which plaintiff has pleaded the facts surrounding his claim, the court cannot perceive any additional facts which the plaintiff might prove in support of his claim.

Specifically, it is plaintiff's claim that he was denied due process because the defendant hearing officers refused to consider the opinion of the Marquette Circuit Court, which plaintiff alleged invalidated the "publisher only," and because they refused to grant him an adjournment to enable him to obtain a copy of the court's opinion for their benefit. He further claims that he was not given a proper notice of intent to conduct the hearing, and that it was error not to provide him with a copy of the directive containing the publisher only rule.

The basic defect in plaintiff's claim is that it is founded on an erroneous assumption, namely, that the "publisher only" rule is invalid, and that he was denied due process because the defendants did not give him the opportunity to prove it at the hearing. Plaintiff has not furnished the court with a copy of the Marquette Circuit Court opinion, which, he claims, he was not given an opportunity to present to the hearing officers, and which, he claims, the hearing officers stated they were not bound to follow in any event. The court will assume for present purposes that the circuit court decision held that the "publisher only" rule was invalid and that it supported plaintiff's argument, as he alleges. The fact is that such a decision

is contrary to a decision of this court.[1] More importantly, it is contrary to a decision of the United States Supreme Court. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court upheld a "publisher only" rule, recognizing that such a restriction is "a rational response by prison officials to an obvious security problem." 441 U.S. at 550. Although *Bell v. Wolfish* involved pretrial detainees, the holding of that case has also been extended to convicted and sentenced prisoners. *Rich v. Luther*, 514 F.Supp. 481 (W.D. N.C. 1981); *Cotton* v. *Lockhart*, 476 F.Supp. 956 (E.D. Ark. 1979), *aff'd.*, 620 F.2d 670 (8th Cir. 1980). See, also, *Zaczek v. Hutto*, 642 F.2d 74 (4th Cir. 1981). If such a rule is valid as to pretrial detainees, it is *a fortiori* valid as to convicted inmates.

Thus, plaintiff's assertion that the hearing officers deprived him of due process by refusing to recognize the opinion of the Marquette County Circuit Court, which allegedly held the "publisher only" rule invalid, and by refusing to give him an adjournment to obtain a copy of that court's opinion is of little import. If such was the holding of that court, it was contrary both to a decision of the United States Supreme Court, as well as a decision of this court specifically upholding the Michigan Department of Corrections rule. Defendants cannot be faulted for not recognizing a decision of a state trial court, which was contrary to the holding of this court specifically and the holding of the highest court of the land generally.

Also without merit is plaintiff's claim that he did not have proper notice of the hearing or a formal notice of intent to conduct the hearing. By his own allegations he was advised by the prison officials of his right to have a hearing on whether the book in question was properly intercepted, and in response thereto he "immediately requested a hearing and staff as-

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[1]

Young v. Johnson et al., Docket No. M78-38, upholding the validity of the "publisher only" rule.

sistance." (Complaint, pars. 8 and 9). A staff assistant was assigned. The hearing having been held at his request, no formal notice was required. Nor was it constitutional error not to provide him with a copy of the policy directive containing the "publisher only" rule . Again, by his own allegations, the notice advising him of his right to a hearing also advised him that, "All books must come from publishers or suppliers." (Complaint, part. 8). The quoted words adequately paraphrased the wording of the directive which barred receipt of "Material received from sources other than directly from authorized vendors or publishers." Failure to furnish him a copy of the directive itself clearly was not prejudicial.

In any event, even assuming that the all procedural rules of the Michigan Department of Corrections applicable to plaintiff's administrative hearing were not strictly adhered to, as plaintiff appears to allege, such failure does not necessarily amount to a constitutional claim. In ***Bills v. Henderson***, 631 F.2d 1287 (6th Cir. 1980), the court held that the failure of prison officials to follow the procedural requirements of their own policy directives does not create protected liberty interests cognizable in a civil rights action. The court held:

> "Plaintiffs also argue that they are entitled to the procedural protections contained in the Guidelines because those procedures create a protected liberty expectation. Other circuits which have addressed this question have rules that protected liberty interests are not created by statutes or rules which establish only procedural requirements. *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Lombardo v. Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977). . .
>
> "After careful consideration . . . we conclude that procedural rules created by state administrative bodies can-

not, of themselves, serve as a basis for a separate protected liberty interest." *Id* at 1298.

See, also, *Stiltner v. Rhay*, 322 F.2d 314, 315 (9th Cir. 1963); *Almanza v. Oliver*, 368 F. Supp. 981, 985 (E.D. Va. 1973).

The court also notes that if the prison officials did in fact violate any procedural rules set forth in the Michigan Department of Corrections for the conduct of administrative hearings, Michigan law provides for judicial review of agency actions in the Michigan courts under the Administrative Procedures Act. *Lawrence v. Department of Corrections*, 88 Mich. App. 167 (1979).[2]

For the reasons herein stated, this action is dismissed.

Dated: August 5, 1982

Douglas W. Hillman /s/
Douglas W. Hillman
District Judge

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[2]

It is also noted that the actions of the defendants of which plaintiff here complains were taken by them in their role as hearing officers and in the course of their official duties. As such, they are probably entitled to the judicial immunity accorded to inferior judicial or quasi-judicial officers. *Butz v. Economou*, 438 U.S. 478, 514 (1978); *Littleton v. Fisher*, 530 F.2d 691 (6th Cir. 1976).

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN, NO. DIV.

FLOYD SPRUYTTE vs. RICHARD WALTERS, Psychologist, MIPC, and RONALD SCHINK, Psychologist, MIPC	Civil Action File No. M82-142CA

JUDGMENT

This action came on for consideration before the Court, Honorable Douglas W. Hillman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged this action is dismissed.

Dated at Marquette, MI, this 11th day of August, 1982.

Gerald H. Liefer
Clerk of Court
J. L. Dees /s/
by: Deputy Clerk

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION

FLOYD SPRUYTTE, Plaintiff v. RICHARD WALTERS and RONALD SCHINK, Defendants	No. M82-142 CA

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff has filed motion for reconsideration of the court's judgment of August 11, 1982, dismissing this action.

Although plaintiff refers in his motion to Rule 60 of the Federal Rules of Civil Procedure, a motion for reconsideration should properly be considered as a motion to alter or amend a judgment under Rule 59(e), and the court elects to treat it as such. *Huff v. Metropolitan Life Insurance Company*, 675 F.2d 119 (6th Cir. 1982); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979).

Rule 59(e) requires that such motion be served not later than ten days after entry of judgment Moreover, Rule 6(b) provides that the court may not extend the time for filing such motion. The present judgment was filed on August 11, 1982. The motion for reconsideration was filed 23 days later on September 3, 1982. In a letter to the clerk of the court accompanying his motion for reconsideration, plaintiff states that he did not serve his motion upon the defendants because his action was dismissed prior to service. Assuming this is a

valid excuse for not serving the defendants, the court is of the opinion that it was incumbent upon him to at least file his motion within ten days after entry of judgment. Otherwise, a motion for reconsideration under these circumstances would be deemed timely irrespective of when it was filed.[1]

Plaintiff's motion is denied as having been untimely filed.

IT IS SO ORDERED.

September 14, 1982

Douglas W. Hillman /s/
Douiglas W. Hillman
District Judge

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[1]
Plaintiff's motion is dated September 1, 1982, which is 21 days after the judgment was entered. Thus, plaintiff's failure to make a timely motion cannot be attributed to the fact that his complaint was dismissed prior to service of the complaint, since the time for making a timely motion had long expired.

SPRUYTTE v. WALTERS
Cite as 753 F.2d 498 (1985)

Floyd SPRUYTTE, Plaintiff-Appellant,

v.

Richard WALTERS and Ronald Schink, Defendants-Appellees.

No. 82-1676.

United States Court of Appeals,
Sixth Circuit.

Submitted Oct. 16, 1984.

Decided Jan. 28, 1985.

Prison inmate brought action against prison officials alleging violation of due process by their prohibiting him from receiving paperback dictionary from his mother. The United States District Court for the Western District of Michigan, Douglas W. Hillman, J., sua sponte dismissed the in forma pauperis complaint, and inmate appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) under Michigan law, policy directive adopted by Department of Corrections prohibiting inmates from receiving books except from publishers was invalid because it conflicted with state regulation allowing inmates to receive books that did not threaten security; (2) state regulation allowing inmates to receive books that did not threaten security created type of inter-
[499] est protected under due process; (3) by applying the policy directive, prison officials violated inmate's due process

rights; and (4) prison officials were not entitled to qualified immunity.

Reversed and Remanded.

Weick, Senior Circuit Judge, filed an opinion concurring in part.

1. Federal Civil Procedure 2734

Rule that district court may not sua sponte dismiss complaint without allowing service of complaint on defendant permitting plaintiff to amend complaint or respond to court's notice of intent to dismiss does not apply to dismissals of in forma pauperis claims as frivolous. 28 U.S.C.A. § 1915(d).

2. Federal Civil Procedure 2734

In forma pauperis complaint may be dismissed as frivolous if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. 28 U.S.C.A. § 1915(d).

3. Prisons 4(8)

Under Michigan law, policy directive adopted by Department of Corrections which limited inmates to receiving books only from publishers was invalid where it conflicted with administrative rule allowing inmates to receive books which do not present threat to order or security of the institution which the policy purported to interpret but which in fact, the policy restricted.

4. Administrative Law and Procedure 303

When agency is required to act pursuant to a rule but has failed to do so, agency is wholly without legal authority to act.

5. Prisons 4(8)

Under rule adopted by Michigan Department of Corrections allowing inmates to receive books that do not pose security threat, prisoner had right granted by state law to receive paperback dictionary from his mother.

6. Constitutional Law 272(2)

Prisoner's right under Michigan law to receive books that do not threaten prison security, whether cast as property interest or liberty interest, was type of interest protected under due process where specific, substantive criteria restricted prison officials' discretion to prohibit receipt of books. U.S.C.A. Const.Amend. 14.

7. Constitutional Law 252.5

Mere expectation of receiving benefit is not enough to create protected interest. U.S.C.A. Const.Amend. 14.

8. Constitutional Law 251.5

Procedural requirements demanded by due process are determined as matter of federal law. U.S.C.A. Const.Amend. 14.

9. Prisons 4(8)

Prison inmate was denied fundamental right to procedural regularity when correction officials prohibited him from receiving paperback dictionary from his mother under policy directive against inmates' receiving books except from publishers, which policy was invalid because in conflict with regulation allowing inmates to receive books that were not threatening to security, where, by using the invalid directive, prison officials failed to make determination that dictionary sent to inmate posed threat to security. U.S.C.A. Const.Amend. 14.

10. Constitutional Law 251.5

State's failure to comply with its own procedural requirements is not in itself a violation of due process; however, when state creates entitlement and provides that it may not be defeated except upon finding of specific substantive predicate, state's defeat of that entitlement without making such a finding is violation of due process. U.S.C.A. Const.Amend. 14.

11. Civil Rights 13.13(1)

Plaintiff who alleges infringement of property rights generally must show that state remedies are inadequate; however, that rule is inapplicable when deprivation of property is caused by conduct pursuant to established state procedure rather than [500] random and unauthorized action. U.S.C.A. Const.Amend. 14.

12. Civil Rights 13.9

Availability of adequate state postdeprivation procedures by which prison inmate could challenge prison officials' use of invalid policy directive to deny him receipt of paperback dictionary from his mother was irrelevant to inmate's civil rights action alleging violation of due process where basis for denying inmate receipt of the book was policy directive adopted by Department of Corrections but invalidated because it conflicted with formally adopted rule of the Department. U.S.C.A. Const.Amend. 14.

13. Civil Rights 13.8(1)

Prison official is immune from liability in inmate's civil rights action unless conduct violates clearly established statutory or constitutional rights of which reasonable person would have known. 42 U.S.C.A. § 1983.

14. Civil Rights 13.8(1)

Official is not entitled to immunity from action seeking only injunctive or declaratory relief. 42 U.S.C.A. § 1983.

15. Civil Rights 13.8(1)

Prison officials were not entitled to qualified immunity from civil rights action brought by inmate alleging that prison officials violated due process by failing to follow state regulation allowing inmate to receive books that did not threaten security where, by following invalid policy directive prohibiting inmates from receiving books except from publishers, prison officials violated clearly established conflicting state regulation. 42 U.S.C.A. § 1983.

16. Federal Courts 269, 272

Prison inmate was not barred by Eleventh Amendment from bringing action against prison officials for violating due process by prohibiting him from receiving paperback dictionary from his mother where the inmate's claim for money damages was against officials in their individual capacities and where his claim for prospective injunctive relief was based on violation of federal constitutional rights and not state law. U.S.C.A. Const.Amend. 11.

Meri Anne Stowe, Lansing, Mich. (court-appointed), for plaintiff-appellant.

Frank J. Kelley, Atty. Gen. of Mich., Thomas C. Nelson, Asst. Atty. Gen., Corrections Div., Criminal Appeals Section, Lansing, Mich., for defendants-appellees.

Before MARTIN and JONES, Circuit Judges, and WEICK, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

Floyd Spruytte, an inmate at the Michigan Intensive Program Center, Marquette, appeals the district court's *sua sponte* dismissal of his *in forma pauperis* complaint under 42 U.S.C. § 1983. We reverse and remand the case to the district court.

[1, 2] In *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir.1983), we held that a district court may not *sua sponte* dismiss a complaint without allowing service of the complaint on the defendant and permitting the plaintiff to amend the complaint or respond to the court's notice of intent to dismiss. *Id.* at 1112. The *Tingler* rule does not apply to dismissals of *in forma pauperis* claims as frivolous under 28 U.S.C. § 1915(d). The district court's dismissal, therefore, must meet the requirements of section 1915(d). In *Malone v. Colyer*, 710 F.2d 258 (6th Cir.1983), we held that a complaint may be dismissed under section 1915(d) "if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.* at 261.

Rather than a summary remand, we feel it appropriate to review the record as a whole to determine if in fact the complaint was "frivolous." Many of the issues in this case are affected by facts that are a matter of public record, and the brief for the prison officials contains several significant admissions

Spruytte's *pro se* complaint, which seeks declaratory and injunctive relief as well as money damages against two prison hearing officers in their individual and official capacities, alleges that prison officials refused to give him a paperback dictionary that his mother had mailed to him. Spruytte requested an administrative hearing and a staff assistant to aid him. Spruytte asked the assistant to obtain a copy of an opinion

the Marquette Circuit Court which he claimed entitled n to receive the book.

Without notifying Spruytte of the date or time of his hear-, prison officials called Spruytte to the office for a hearing. that time, Spruytte's "assistant" told Spruytte that is was responsibility to obtain the state court opinion, so no copy s available. Spruytte requested an adjournment of the hear- so that he could obtain a copy of the decision This request s denied. The hearing officers found that Spruytte was not itled to receive the dictionary, and they ordered that it be urned to his mother at his expense. Spruytte then filed this *se* action against the hearing officers.

Spruytte's complaint, liberally construed, *Haines v. Kerner*, U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per iam), is that the officials' actions deprived him of a prop- y interest without due process of law under the fourteenth endment. Specifically, Spruytte claims that state law con- s on him a property interest in receiving books that do not eaten the security of the prison. He claims that the offi- ls' refusal to give the dictionary to him was based on a partment of Corrections policy that is invalid under Mich- n law and that application of that policy to defeat his stitutionally protected property interest was a denial of e process.

The state-law source of the property interest claimed by ruytte is a prison regulation found in Mchigan's adminis- tive code. Rule 791.6603(3) states in part:

> A resident may receive any book, periodical, or other publication which does not present a threat to the order or security of the institution or to resident rehabilitation.

At the administrative hearing, prison officials did not contend that the dictionary sent by Spruytte's mother was "a threat to the order or security of the institution" Instead, the officials claimed that the dictionary was properly withheld pursuant to a "publisher-only" rule contained in a policy directive of the Department of Corrections. This Policy Directive, PD-BCF-63.03, provides: "Prisoners shall have access to all books, periodicals and other publications except . . . material received from sources other than directly from authorized vendors or publishers." The text of the hearing officers' decision states:

> **REASON FOR DISPOSITION:**
>
> Rejection of above material upon: the MDOC *Mailing Regulations Concerning Books and Magazines for Resident Reading* which indicates that "books and magazines must be ordered through your counselor." Policy Directive PD-BCF-63.03 which exempts written "material received from sources other than directly from authorized vendors or publishers"; and *Admin.Rules and Statutes* R791.6603-(3) from which above 2 Departmental guidelines are derived. This decision is based upon these DOC policies and directives since they constitute the source of hearings decisions, as court orders and decisions cannot be included in the hearings process until implementation by the DOC takes place. A postponement of this hearing is denied as the responsibility for obtaining the aforementioned court order lies with resident, such liability for obtaining materials not being the hearing officer's and hence not a legitimate reason for delaying this decision.

In the context of this case, the question whether state law creates a property interest in Spruytte's receipt of non-threatening publications requires us to make a two-step inquiry. As a first step, we must determine whether, as a matter of state law, Spruytte is entitled to receive the dictionary. This requires

us to decide whether, as Spruytte claims, the Department of Corrections' Policy Directive PD-BCF-63.03 conflicts with Michigan's Administrative Rule [502] 791.6603(3).[1]

If Spruytte is entitled to receive the dictionary as a matter of state law, we must determine whether, as a matter of federal law, Spruytte's state-law entitlement rises to the level of a federally protected property interest.

We are not the first court to consider whether Michigan law entitles prisoners to receive non-threatening publications. Spruytte's complaint states that he had asked a staff assistant to obtain a copy of a state court decision which Spruytte claimed entitled him to receive the dictionary. The case that Spruytte sought, *Marsh v. Michigan Department of Corrections*, No. 11531 (Marquette Cir.Ct. March 3, 1981), squarely holds that, as a matter of state law, the Department's publisher-only rule conflicts with Administrative Rule 791.6603. The Marquette Circuit Court subsequently has reiterated the position it took in *Marsh*. In *Mithrandir v. Michigan Department of Corrections*, No. 11531 (Marquette Cir.Ct. Feb. 11, 1983), a prisoner at the Michigan Intensive Program Center was sent a package of ten paperback books from a bookstore. Authorities at the prison mail center rejected the package and officials at the subsequent administrative hearing upheld the rejection based on the publisher-only rule contained in the Policy Directive. Mithrandir then sought relief in state court, claiming that the Policy Directive is invalid as a matter of state law. Marquette Circuit Judge Edward A. Quinnell agreed:

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[1]

We believe the district court misconstrued Spruytte's complaint. The court dismised the complaint based on *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and *Young v. Johnson*, No. M78-38 CA (W.D.Mich. Jan. 27, 1981). Those cases upheld publisher-only rules against first amendment attacks. They are not applicable here because Spruytte claims that the state has no valid publisher-only rule.

> Defendant concedes that the present 10 paperback books do not contain contraband nor is their content such that they would be rejected under the [administrative] rule. However, defendant maintains that the receipt of *any* used book presents ". . . a threat to the order or security of the institution . . ." in that used books may conceal currency, razor blades, or may contain drugs absorbed by the paper.
>
> I cannot agree with that interpretation of the rule. The rule clearly provides that a resident is to receive *any* book, not just new books, provided that they do not threaten the institution.

Mithrandir v. Michigan Department of Corrections, slip op. at 2-3. Judge Quinnell concluded, "I find, as I have previously found, that the Policy Directive is incompatible with the Administrative Code provisions. . . ." *Id.* at 2. On at least three occasions Judge Quinnell has found the Department in contempt of the Marquette Circuit Court for preferring its Policy Directive to the controlling Michigan Administrative Rule. *See Mithrandir v. Michigan Department of Corrections*, No. 11531, slip op. at 4 (Marquette Cir.Ct. Feb. 11, 1983); *Mithrandir v. Michigan Department of Corrections*, No. 11531 (Marquette Cir.Ct. Nov. 5, 1981); *Marsh v. Michigan Department of Corrections*, No. 11531, slip op. at 4 (Marquette Cir.Ct. March 30, 1981); *see also Marsh v. Michigan Department of Corrections*, No. 80-11531-CZ (Marquette Cir.Ct. Aug. 19, 1980).

A section 1983 claim adjudicated in federal court may be the only means of conclusively determining the correct interpretation of the Administrative Rule and the Policy Directive. The course of the litigation in the Marquette Circuit Court indicates that the Department of Corrections may be committed to a policy of preventing state appellate court adjudi-

cation of the controversy. The Department's strategy apparently has been to enforce its Policy Directive despite court orders from the Marquette Circuit Court. Thus, a prisoner must litigate every time he wants to receive a book from a source other than a publisher.

The Marquette Circuit Court's contempt citations have been directed at the Department of Corrections rather than individual [503] officers. The court has been reluctant to cite the individual officers because they are operating under the Department's Policy Directive. Of course, the Court cannot incarcerate the Department of Corrections and a fine is ineffective because the result would be mere transfer of funds from one state agency to another. Because the Marquette Circuit Court is without an effective remedy, the Department of Corrections has chosen to ignore the circuit court orders. To insulate its actions from review by the state's appellate courts, the Department refuses to appeal the circuit court's contempt citations, despite the pleas of the circuit judge: "I strongly suggest to the Department that they either appeal this present order, in order that the relationship between the Policy Directive and the Administrative Rule can be clarified, or initiate procedures under the Administrative Procedures Act to have an amendment to the Administrative Code rule. . . . If such an amendment is not that vital [to the order or security of the prison], the defendant Department should honor this and the prior orders of this court. . . ." *Mithrandir v. Michigan Department of Corrections*, No. 11531, slip op. at 3 (Marquette Cir.Ct. Feb. 11, 1983).

[3] We agree with Judge Quinnell that Policy Directive PD-BCF-63.03 is without legal effect under Michigan law. The starting point of our analysis is the legislation from which the Department of Corrections draws its authority to issue rules. The relevant statute provides:

> The director shall promulgate rules pursuant to Ac No. 306 of the Public Acts of 1969, as amended, bein sections 24.201 to 24.315 of the Michigan Complied Laws which shall provide:
>
> > (d) For the management and control of state pena institutions. . . .

M.C.L.A. § 791.206. The quoted language "contains a clea legal mandate for the Commission to promulgate rules. *Lundberg v. Corrections Commission*, 57 Mich. App. 327, 33(225 N.W.2d 752, 753 (1975).

The Department of Corrections is an agency that is subjec to the rule promulgation requirements of Michigan's Adminis trative Procedure Act. *Human Rights Party v. Michigan Co rections Commission*, 76 Mich.App. 204, 256 N.W.2d 43 (1977). The quoted language from M.C.L.A. § 791.206 make very certain that the rules adopted by the Department mus be promulgated pursuant to Michigan's Administrative Pro cedure Act, MC.L.A. § 24.201 *et seq*. The APA sets out de tailed procedures by which an agency may adopt rules. *See e.g.*, M.C.L.A. §§ 24.241 and 24.242. A rule that does no comply with the procedural requirements of the APA is invali under Michigan law. *See* M.C.L.A. §§ 24.243 and 24.245.

Agency compliance with the provisions of the APA is pa ticularly important because all proposed rules are subject t the approval of the Michigan legislature. A proposed rul must be submitted to a legislative joint committee on admini trative rules. *See* M.C.L.A. § 24.245(2). If the joint committe disapproves the proposed rule or is at an impasse after tw months of consideration, the agency may not adopt the rul unless it is subsequently approved by a concurrent resolutio of the legislature or by further action of the joint committe *See* M.C.L.A. § 24.245(6). Thus, the question whether th

Policy Directive may be adopted without compliance with the APA is more than a mere question of notice and hearing requirements; it is a question of the allocation of decision-making authority.

It is undisputed that the Policy Directive at issue here was not issued pursuant to the requirements for promulgation of an agency rule. The Policy Directive may be valid, therefore, only if it is not a "rule" within the meaning of the APA. The APA adopts the following definition:

> "Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency . . . but does not include the following:
>
> • • • • •
>
> (g) An intergovernmental, interagency or intra-agency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to, the public.
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.
>
> • • • • •

M.C.L.A. § 24.207.

Policy Directive PD-BCF-63.03 does not fall within the exception provided by M.C.L.A. § 24.207(g). That exception applies only when the agency's directive "does not affect the rights of . . . the public." The rights of the public are affected by Policy Directive PD-BCF-63.03. In the absence of the

Policy Directive, Spruytte's mother would have the right to send a non-threatening paperback dictionary to her son. The Policy Directive purports to take that right from her.

In *Schinzel v. Department of Corrections*, 124 Mich.App. 217, 333 N.W.2d 519 (1983) (per curiam), the court invalidated a policy directive that prohibited inmates' receipt of postage stamps through the mail. Prison officials argued that the policy affected only the rights of the inmates, not those of the public, and therefore the rule promulgation requirements of the APA were inapplicable. *Id.* at 219, 333 N.W.2d at 519-20. Without deciding whether inmates are members of the public, *id.* at 219 n. 1, 333 N.W.2d at 520 n. 1, the court held that the policy "den[ied] members of the general public their legal right to send postage stamps to inmates." *Id.* at 219, 333 N.W.2d at 520. The court invalidated the policy directive because "it affects the rights and practices available to the public; it must be promulgated as a rule under the proper procedures set out by the APA." *Id.* at 220, 333 N.W.2d at 520; *see also Schinzel v. Marquette Prison Warden*, 123 Mich. App. 763, 765, 333 N.W.2d 348, 349 (1983), *modified*, 419 Mich. 865, 348 N.W.2d 5 (1984) (prison could not daopt a policy directive limiting amount of legal materials prisoner could transfer to new prison because "[t]he rulemaking procedures of the [APA] may not be circumvented.") The facts of this case are squarely within the holding in *Schinzel v. Department of Corrections*, 124 Mich.App. 217, 333 N.W.2d 519 (1983) (per curiam); the Policy Directive is not within the exception provided by M.C.L.A. § 24.207(g).

We also conclude that the Policy Directive is not an "interpretive statement" exempt from the rule promulgation requirements by virtue of M.C.L.A. § 24.207(h). The Policy Directive conflicts with Administrative Rule 791.6603(3), the Rule the Directive purports to interpret. As Judge Quinnell noted in *Mithrandir v. Michigan Department of Corrections*,

No. 11531 (Marquette Cir.Ct. Feb. 11, 1983), on its face the Administrative Rule confers on prisoners the right to receive *any* publication that does not threaten the security of the prison.

In *Mithrandir* the Department argued that the Policy Directive creates a category of books—those not sent by publishers—that, as a class, threaten the security of the prison. According to that argument, the Policy Directive is a legitimate interpretation, not a contradiction, of the Administrative Rule. That position is untenable for several reasons.

First, the exception created by the Policy Directive is simply too broad to be deemed an interpretation of the Administrative Rule. The Rule entitles prisoners to receive *any* publication that is not threatening to security. The affirmative and expansive language of the Rule is incompatible with an exception that would see a prisoner's right to receive books constricted to the degree contemplated by a publisher-only rule.

Second, publisher-only rules are not uncommon among state and federal prison regulations. *See, e.g., Bell v. Wolfish*, 441 [505] U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Zaczek v. Hutto*, 642 F.2d 74 (4th Cir. 1981); *Cotton v. Lockhart*, 620 F.2d 670 (8th Cir.1980). If the drafters of the Administrative Rule had intended to adopt a publisher-only rule they did not lack illustrative models. Additionally, the brevity and precision of the Policy Directive indicate that the drafting of a publisher-only rule is not a difficult task. In the face of available illustrative models and an uncomplicated task, the drafters of the Administrative Rule produced a regulation that permits a prisoner to receive "any book, periodical or other publication" unless the book poses a threat to security. The language of the Administrative Rule does not so much as hint at adoption of a publisher-only rule. The unavoidable inference is that the drafters of the Rule rejected adoption of a publisher-

only limitation. A Policy Directive that would read such a restriction back into the administrative scheme is not a proper interpretation of the Administrative Rule.

Third, the text of the Administrative Rule demonstrates that a prisoner is entitled to receive a book unless prison officials make a determination that the individual book threatens security, not that the book belongs to a category of books that may threaten security. The requirement of an individualized determination is evident when we look beyond the limited portion of Administrative Rule 719.6603(3) which we have considered thus far and examine the Rule in its entirety. The full text of subsection (3) provides:

> *There is no limit on the amount of incoming mail a resident may receive.* Incoming mail from other correctional facilities may be read, and *all incoming mail shall be opened and inspected for money and contraband* prior to delivery to the addressee. The department shall follow the guidelines of the auditor general for receiving and safe handling of money and valuables confiscated from incoming mail. A resident may receive any book, periodical, or other publication which does not present a threat to the order of security of the institution or to resident rehabilitation.

(emphasis added).

A Policy Directive that purports to restrict prisoners' access to an entire category of publications is not a legitimate interpretation of a Rule that by its terms requires officials to determine that an *individual* book poses a threat to security. The means adopted—individualized inspection—applies to "all incoming mail," not just personal correspondence.

Finally, the Supreme Court has held that the purpose of a publisher-only rule is to reduce "the administrative difficulties

posed by the necessity of carefully inspecting each book mailed from unidentified sources." *Bell v. Wolfish*, 441 U.S. 520, 551, 99 S.Ct. 1861, 1880, 60 L.Ed.2d 447 (1979). The publisher-only rule of Policy Directive PD-BCF-63.03 is an administrative technique that is designed to obviate the need for "carefully inspecting each book," but such careful inspection is precisely what is mandated by Administrative Rule 791.6603(3). Therefore, the Policy Directive does not fall within M.C.L.A. § 24.207(h)[2]

[4] Our conclusion that the Policy Directive falls within the exception of neither M.C.L.A. § 24.207(g) nor M.C.L.A. § 24.207(h) is fully supported by a review of the decisions of the Michigan courts. They have shown a strong tendency to require agencies to act pursuant to formal rules rather than through informal policies. *See, e.g., Schinzel v. Marquette Prison Ward-* [506] *en*, 123 Mich.App. 763, 765, 333 N.W.2d 348, 349 (1983), *modified*, 419 Mich. 865, 348 N.W.2d 5 (1984) (prison policy of limiting amount of legal materials prisoner may transfer to new prison must be implemented by rule); *Williams v. Warden, Michigan Reformatory*, 88 Mich. App. 782, 786, 279 N.W.2d 313, 314-15 (1979) (prison policy providing for forfeiture of good-time credits must be implemented by rule); *Lundberg v. Corrections Commission*, 57 Mich.App. 327, 330, 225 N.W.2d 752, 753 (1975) (issuing writ of mandamus to require prison officials to promulgate rules).

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[2]

The Policy Directive also is not a valid "guideline" as defined in M.C.L.A. § 24.203(6). The Department's substantive grant of authority, M.C.L.A. § 791.206, provides that the Director "shall promulgate *rules* . . . which shall provide: . . . (d) For the management and control of state penal institutions." (emphasis added). The APA itself provides, "An agency shall not adopt a guideline in lieu of a rule." M.C.L.A. § 24.226. Because the substantive grant of authority provides that the Director must act pursuant to rule, the Policy Directive may not be implemented as a guideline. *Williams v. Warden, Michigan Reformatory*, 88 Mich.App. 782, 785, 279 N.W.2d 313, 314-15 (1979).

When an agency is required to act pursuant to a rule but has failed to do so, the agency is wholly without legal authority to act. *Williams, supra,* 88 Mich.App. at 786, 279 N.W.2d at 315; *Jerome v. Crime Victims Compensation Board,* 119 Mich. App. 648, 651-52, 326 N.W.2d 593, 596 (1982) ("Without full compliance with [the APA], there is no rule and no authority to act."). Because Policy Directive PD-BCF-63.03 was neither promulgated pursuant to nor exempted from the procedures established by the APA, it is without legal authority or effect under Michigan law.

[5] To this point, all we have determined is that Policy Directive PD-BCF-63.03 is invalid as a matter of state law. The next step in our inquiry is a determination whether state law grants Spruytte a right to receive the dictionary. We conclude that it does.

With the Policy Directive having no legal effect, we are left with Administrative Rule 791.6603(3). As noted, that Rule grants a prisoner the right to receive any publication that does not threaten prison security or resident rehabilitation. The Rule further provides that the determination of whether a publication is threatening is to be made after an individualized inspection of the publication. It is clear that, as a matter of state law, Spruytte had a right to receive a non-threatening publication.

[6] We must now consider whether Spruytte's state-law right to receive a non-threatening book rises to the level of a property interest protected by the due process clause of the fourteenth amendment to the United States Constitution. The starting point for this analysis is *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972):

> [T]he property interests protected by procedural due process extend well beyond actual ownership of real

> estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Id. at 571-72, 92 S.Ct. at 2706. Spruytte's claim that he is entitled to receive the dictionary may be plausibly cast as an assertion of either a property interest or a liberty interest. On the one hand, his claim is that he is entitled to possess a tangible object. That claim invokes traditional notions of property rights.[3] On the other hand, Spruytte's claim is that, while in prison, he is entitled to receive a book that concededly he could possess were he not incarcerated. That claim may implicate liberty interests. Whether cast as a property interest or a liberty interest, the type of interest claimed by Spruytte is well within the range of interests that are protected under the fourteenth amendment. The analysis for determining whether the state law has granted a protected property interest parallels the analysis for determining whether state law has granted a liberty interest. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); *Walker v. Hughes*,558 F.2d 1247, 1255 (6th Cir.1977).

[7] A mere expectation of receiving a benefit is not enough to create a protected interest. A person who claims an interest [507] in a benefit must "have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. One source of "legitimate entitlements" is state law. *Id.* But not every state law right gives rise to an entitlement. The current law

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[3]

The dictionary was addressed to Spruytte and was received by officials at the mail office at the Marquette Branch Prison. Items sent through the mail generally are subject to the control of the addressee after they have been delivered at the appropriate address. *See Rhode Island Tool Co. v. United States*, 128 F.Supp. 417, 419, 130 Ct.Cl. 698 (1955); U.S.P.S. Domestic Mail Manual § 153.11(a) (1984).

on entitlements is stated in *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), and *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

In *Hewitt* the Court found that Pennsylvania's regulatory framework governing administrative segregation gave prisoners a protected liberty interest in remaining in the general prison population. *Hewitt*, 459 U.S. at 470-71, 103 S.Ct. 870-71. The regulations in question provided that a prisoner could not be removed from the general population unless officials found that "the need for control" or "a threat of a serious disturbance" required removal of the prisoner. *Id.* at 471-72 & 470 n. 6, 103 S.Ct. at 871-72 & 871 n. 6. The Court held that these "specific substantive predicates" to removal of a prisoner, in conjunction with the use of language in the regulations that certain procedures "must" and "shall" be used in determining whether the substantive predicates exist, created a protected interest. *Id.* at 472, 103 S.Ct. at 871.

In *Olim* the Court held that Hawaii's regulations governing transfers of prisoners to other institutions did not give prisoners a protected interest in not being transferred to the United States mainland. *Olim*, 461 U.S. at 249, 103 S.Ct. at 1747. The regulations did not create a protected interest because they placed "no substantive limitations on official discretion." *Id.* Additionally, the Supreme Court of Hawaii previously had held that the officials' discretion to transfer an inmate was "completely unfettered" by the regulations. *Id.* (citing *Lono v. Ariyoshi*, 63 Haw. 138, 144-45, 621 P.2d 976, 980-81 (1981)).

We note and respect the dicta in *Hewitt* and *Olim* that warn against unwarranted federal court intervention in the general administrative control of state prisons. Yet the relationship between the federal courts and state prison administration is determined by the fundamental relationship between the federal courts and the state prisoner's federal constitutional

rights. That fundamental relationship was stated in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974):

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protection when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.

Id. at 555-56, 94 S.Ct. at 2974. To determine the constitutional protection to which a state prisoner is entitled requires that we search through the "atmospherics" of *Hewitt* and *Olim* and discover the legal criteria by which our determination should be guided. *Lucas v. Hodges*, 730 F.2d 1493, 1503 (D.C.Cir.1984). *Hewitt* and *Olim* provides us with a sole criterion to determine whether prison regulations create a federally protected interest.

> [A] state creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers."

Olim, 461 U.S. at 249, 103 S.Ct. at 1747 (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 101 S.Ct. 2460, 2466, 69 L.Ed.2d 158 (1981) (*Brennan*, J., concurring)).

Applying this criterion to the present case, we find that Administrative Rule 791.6603 creates a federally protected interest. The Rule states that a prisoner "may receive any book . . . which does not present a threat to the order or security of the institution or to resident rehabilitation." If a prisoner may receive any non-threatening book, it follows that officials

may not prohibit receipt of a book unless they determine that the book poses a threat to the administration of the prison. The Rule also provides that the individual book must pose a threat, not that the book merely belong to a category of books that may [508] pose a threat. Thus, a finding that an individual book "present[s] a threat to the order or security of the institution or to resident rehabilitation" is a specific substantive predicate to withholding of the book from the prisoner. Because specific, substantive criteria restrict officials' discretion, the Rule creates a federally protected interest.[4]

Having found that Spruytte had a federally protected interest in receiving the paperback dictionary from his mother, it must now be determined whether the state used adequate procedures to defeat that interest. In their brief the defendants do not assert that they made a determination that the dictionary sent to Spruytte posed a threat to security. Instead, they admit, "The Defendants in this case applied and enforced a publisher only rule with respect to a package intended for Plaintiff." This admission alone establishes that the defendants

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[4]

Protected interests previously have been found in cases where the substantive criterion restricted officials' discretion far less than does the criterion before us. A protected interest was found where a prisoner could not be subjected to loss of privileges unless officials found that he had engaged in "major misconduct." *See Walker v. Hughes*, 558 F.2d 1247, 1256 & n. 9 (6th Cir.1977). In *Bills v. Henderson*, 631 F.2d 1287 (6th Cir.1980), a protected interest was found where a prison regulation provided that the purpose of administrative segregation was to "promote and maintain order." *Id.* at 1292-93.

violated Spruytte's due process right to receive a paperback dictionary from his mother.[5]

[8] The procedural requirements demanded by due process are determined as a matter of federal law. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). In the usual case, we must determine whether a claimant is entitled to notice, an opportunity to be heard, cross-examination, the assistance of counsel, and the like. These procedural rights help to guarantee that the dispute resolution process will achieve a fair and accurate result and thus minimize the risk of "substantially unfair or mistaken deprivations" of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 97, 92 S.Ct. 1983, 2002, 32 L.Ed.2d 556 (1972); *see Morrissey v. Brewer*, 408 U.S. 471, 496, 92 S.Ct. 2593, 2608, 33 L.Ed.2d 484 (1972). An accurate result is important because, "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnel*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

[9] The right that was denied Spruytte is one that is fundamental to procedural regularity. He was denied the right to require the state to *make a determination* based on legally relevant criteria. Administrative Rule 791.6603(3) provides

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Spruytte's *pro se* complaint also alleges that the procedures used were defective because he did not receive notice of the date or time of the hearing; he was not given a copy of any policy directive on which the officials would rely at the hearing; his staff assistant refused to obtain a copy of a dispositive state court ruling; the hearing was not adjourned to allow him to obtain a copy of the ruling; officials at the hearing deliberately disregarded an applicable Administrative Regulation; officials deliberately disregarded an applicable state court decision; officials took these actions in retaliation for Spruytte's exercise of his first amendment rights and his activities in helping other prisoners gain access to the courts; and officials withdrew monies from his account unlawfully and without his permission.

that officials may not prohibit a prisoner's receipt of a book unless they conclude that it poses a threat to security. In this case officials in fact prohibited Spruytte's receipt of a book even though they did not make a finding that the book posed a threat to security. The due process violation is not that the officials' finding was erroneous, but that they did not make any relevant finding.

[10] True, the state's failure to comply with its own procedural requirements is not *in itself* a violation of due process. *See Bills v. Henderson*, 631 F.2d 1287, 1296-98 (6th Cir.1980). We conclude, however, that when a state creates an entitlement and provides that it may not be defeated except upon a finding of a specific substantive predicate, the state's defeat of that entitlement without making such a finding is a [509] violation of due process. Indeed, it would be anomalous to conclude that federal courts may impose on states procedures that are designed to enhance the accuracy of factual findings but then conclude that federal courts may not require that the factual findings be made. Our conclusion is well supported in the case law.

In *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), Thompson was arrested for loitering and disorderly conduct when he was in a cafe waiting for a bus. He was fined $10 on each charge. *Id.* at 202, 80 S.Ct. at 627. At trial and on appeal Thompson alleged that the convictions, because they were not based on any evidence, constituted a deprivation of property and liberty without due process. *Id.* at 200, 80 S.Ct. at 625. The court found that the record contained no evidence that Thompson's actions came within the city's definition of "loitering" or "disorderly conduct." *Id.* at 204-06, 80 S.Ct. at 628-29. Because the city provided no evidence that Thompson's activities came within the relevant legal criteria, the conviction of Thompson was a denial of due

process. *Id.* at 206, 80 S.Ct. at 629. *Cf. Vachon v. New Hampshire,* 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974).

In the criminal context, the doctrine of *Thompson* has been displaced in part by *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Thompson* retains its force in civil actions in which the state provides that an interest may be defeated only upon a finding of specific substantive predicates. The doctrine of *Thompson* is well suited to civil actions alleging violations of due process under section 1983. In *Thompson* itself the defendant alleged that the conviction constituted a deprivation of property as well as liberty, *Thompson,* 362 U.S. at 200, 80 S.Ct. at 625, and all that was at stake was $20 in fines. *Id.* at 202, 80 S.Ct. at 627. Many courts have applied *Thompson* in civil cases to require that the state support its decision with substantial evidence. *See Strickland v. Inlow,* 485 F.2d 186, 190 (8th Cir.1973), *vacated on other grounds sub nom. Wood v. Strickland,* 420 U.S. 308, 323, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975); *Sostre v. McGinnis,* 442 F.2d 178, 198-99 (2d Cir.1971) (en banc), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972); *Jones v. Latexo Independent School District,* 499 F.Supp. 223, 239 (E.D. Tex.1980); *Kucinich v. Forbes,* 432 F.Supp. 1101, 1116 (N.D.Ohio 1977); *Papish v. Board of Curators,* 331 F.Supp. 1321, 1323 n. 1 (W.D.Mo.1971). A fair, yet more narrow, reading of *Thompson* requires that the state at least make the finding required by its substantive law. Because the state officials deprived Spruytte of his dictionary without first making a determination that the book posed a threat to security, the officials violated Spruytte's due process rights. *Cf. Wolff v. McDonnell,* 418 U.S. 539, 565, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974) (requirement of a written record helps ensure that officials will act fairly); *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)

("the decision maker should state the reasons for his determination and indicate the evidence he relied on").

[11, 12] Next, the defendants argue Spruytte may not prevail on a claim premised on due process because state post-deprivation procedures are adequate to redress any loss that Spruytte suffered. It is true that a plaintiff who alleges an infringement of property rights generally must show that state remedies are inadequate. *Hudson v. Palmer*, —— U.S. ——, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Vicory v. Walton*, 721 F.2d 1062 (6th Cir.1983), *cert. denied*, —— U.S., ——, 105 S.Ct. 125, 83 L.Ed.2d 67 (1984). That rule is inapplicable, however, when "a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson v. Palmer*, 104 S.Ct. at 3203; *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982); *Lee v. Western Reserve Psychiatric Habilitation* [510] *Center*, 747 F.2d 1062, 1068 (6th Cir.1984). *Cf. Monroe v. Pape*, 365 U.S. 167, 235, 81 S.Ct. 473, 510 5 L.Ed.2d 492 (1961) (Frankfurter, J., dissenting) (section 1983 provides cause of action for "deprivations of federal rights under color of any 'statute, ordinance, regulation, *custom or usage*' of a State") (emphasis supplied by Justice Frankfurter). The deprivation of Spruytte's property resulted from application of a policy directive adopted by the Department of Corrections. Policy Directive PD-DWA-13.01 provides that a policy directive "is the formal statement of the Department's policy on a given subject." Further, it is a matter of public record that the Department in fact has applied Policy Directive PD-BCF-63.03 to defeat prisoners' protected interests, has willfully, systematically refused to follow state law, and has been held in contempt of court for doing so. *See Mithrandir v. Michigan Department of Corrections*, No. 11531, slip op. at 4 (Marquette Cir.Ct. Feb. 11, 1983); *Mithrandir v. Michigan Department of Corrections*, No. 11531,

(Marquette Cir.Ct. Nov. 5, 1981); *Marsh v. Michigan Department of Corrections,* No. 11531, slip op. at 4 (Marquette Cir. Ct. March 30, 1981); *see also Marsh v. Michigan Department of Corrections,* No. 80-11531-CZ (Marquette Cir.Ct. August 19, 1980). The deprivation of Spruytte's protected interest was "caused by conduct pursuant to established state procedure." *See Hudson v. Palmer,* 104 S.Ct. at 3203. Thus, the adequacy of state post-deprivation procedures is irrelevant.

[13, 14] Next, the district court held that the prison officials are entitled to immunity even if they violated Spruytte's constitutional rights. Certainly, administrative officials are entitled to qualified immunity under certain circumstances. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This immunity would extend to supervisory prison officials, *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), and to prison officials who conduct administrative hearings, *Jihaad v. O'Brien,* 645 F.2d 556, 564 (6th Cir.1981). An official is immune unless the conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. An official is not entitled to immunity from actions seeking only injunctive or declaratory relief. *Id.* at 806, 102 S.Ct. at 2732; *Davis v. Scherer,* —— U.S. ——, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139 (1984).

[15] There can be no question the prison officials here violated a clearly established state regulation. Administrative Rule 791.6603 was promulgated years before the June 10, 1982 hearing. Of the four cases in the *Mithrandir* series, three were decided prior to the hearing. Moreover, cases such as *Williams v. Warden, Michigan Reformatory,* 88 Mich.App. 782, 279 N.W.2d 313 (1979), and *Lundberg v. Corrections Commission,* 57 Mich.App. 327, 225 N.W.2d 752 (1975), gave officials ample notice that they were required to act pursuant to administrative rule.

The Supreme Court has determined that violation of a clearly established state regulation is sufficient to cause officials to forfeit their qualified immunity. In *Davis v. Scherer*, ——— U.S. ———, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), a former state official, suing under section 1983, alleged that state officials violated due process by discharging him without a pre-termination hearing. The officials' refusal to grant a pre-termination hearing was a violation of an applicable state regulation. *Id.* 104 S.Ct. at 3017. The Court held, however, that the violation of the regulation did not revoke the immunity available to the officials. *Id.* 104 S.Ct. at 3020. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates *some* statutory or administrative provision." *Id.* (emphasis added).

In *Scherer* the regulation that was violated was unrelated to Scherer's underlying section 1983 claim. As the Court carefully noted, "Appellee does not contend here that the procedural rules in state law govern the constitutional analysis of what pro- [511] cess was due him under the Fourteenth Amendment" *Id.* 104 S.Ct. at 3019 n. 11. Indeed, because federal law determines what process is due, *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the violation of the state regulation in *Scherer* did not "bear upon the claim of constitutional right that appellee asserts under § 1983." *Scherer*, 104 S.Ct. at 3019. The Court held that state officials lose their immunity if they violate a state regulation that "provides the basis for the cause of action sued upon." *Id.* 104 S.Ct. at 3020 n. 12. The critical distinction, then, is between violation of regulations that "bear upon the claim of constitutional right" and those that do not.

In *Scherer* the Court noted, "State law may bear upon a claim under the due process clause when the property in-

terests protected by the Fourteenth Amendment are created by state law. *See Board of Regents v. Roth,* [408 U.S. 564], 577 [92 S.Ct. 2701, 2709, 33 L.Ed.2d 548] [(1972)]." *Scherer,* 104 S.Ct. at 3019 n. 11. Thus, in the context of a violation of due process, the critical distinction between regulations that bear upon the constitutional right and those that do not is collapsed into the distinction between regulations that give rise to the protected interest and regulations that merely provide what process is due once a protected interest has been found. The latter distinction is consistent with a goal of preserving official immunity when the official violates a regulation that is "irrelevant to the merits of [the] underlying constitutional claim." *Scherer,* 104 S.Ct. at 3018. Violation of a state regulation that defines specific substantive predicates becomes relevant because state law determines whether a claimant has a protected interest. *See Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

In *Scherer* the claimant did not allege that state officials failed to abide by the substantive criteria by which the decision whether to discharge him was to be made; he merely alleged that officials violated a regulation that specified the procedures to be used in making the substantive determination. By contrast, the officials here violated Administrative Rule 791.6603(3), the very rule that creates a protected interest and defines the criteria that must be fulfilled before the interest may be defeated. Because the officials violated that rule and the rule was clearly established at the time of the violation, the officials are not entitled to immunity.

[16] Finally, the defendants argue that the eleventh amendment prevents a federal court from ordering relief in this case. We disagree. The eleventh amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . .

The amendment has been construed to prohibit suits against a state brought by its own citizens as well as those brought by citizens of another state. *See Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Our only task is to determine whether Spruytte's suit is one "commenced or prosecuted against one of the United States."

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), is the foundation for determining whether a claimant may maintain a federal court action for damages against state officials in their individual capacities when the claim alleges a constitutional violation. The Court in *Scheuer* stated that "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Id.* at 238, 94 S.Ct. at 1687. The holding was based upon the fiction of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which the *Scheuer* Court explained:

> Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Constitution, he
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> > 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject- [512] ed *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'

Scheuer, 416 U.S. at 237, 94 S.Ct. at 1687 (quoting *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908)) (emphasis supplied by the *Scheuer* Court). The *Scheuer* Courts reasoning that the eleventh amendment does not bar an action for money damages against a state official in an individual capacity is consistent with the case law on whether an action is one "against one of the United States." An action is one against a state, and is therefore barred by the eleventh amendment, only if the relief requested would "expend itself on the public treasury." *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (quoting *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947)); *see Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). *Cf. Stafford v. Briggs*, 444 U.S. 527, 542 n. 10, 100 S.Ct. 774, 784 n. 10, 63 L.Ed.2d 1 (1980) (whether action is one against the government is determined by asking "who will pay the judgment?").

A money judgment against state officials in their individual capacities would not be paid from the public treasury.[6] Spruytte's claim against the prison officials in their individual capacities therefore is not barred by the eleventh amendment. Spruytte's claim against the officials in their official capacities, however, is barred because any monetary relief afforded would be paid from public funds. *See Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Our conclusion that Spruytte may maintain his action against state officials in their individual capacities is not altered by

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A government may not manufacture immunity for its employees by agreeing to indemnify them. *Demery v. Kupperman*, 735 F.2d 1139, 1146-47 (9th Cir.1984); *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867, 875 (8th Cir.1974); L. Tribe, American Constitutional Law 133 n. 22 (1978).

Pennhurst State School & Hospital v. Halderman, ___ U.S. ___, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). One sentence in *Pennhurst* states, "Under *Edelman v. Jordan*, [415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)], a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court." *Pennhurst*, 104 S.Ct. at 920. A correct interpretation of this quoted language requires some discussion of *Pennhurst* and *Edelman*.

The plaintiffs in *Pennhurst* sought a federal-court injunction that would prevent state officials from violating state law. *Pennhurst*, 104 S.Ct. at 903-06. State officials claimed that the requested relief would violate the eleventh amendment. *Id.* 104 S.Ct. at 906. The Court began its analysis by noting that the action was one against the state because the relief requested, an injunction, would operate against the state. *Id.* 104 S.Ct. at 908 & n. 11. The Court observed that, even if the action is one against the state, the fiction of *Ex parte Young* permits the action to proceed in federal court if the plaintiff raises a constitutional claim. *Id.* 104 S.Ct. at 909. Finally, the Court held that the fiction of *Ex parte Young* may not be applied when, as in *Pennhurst*, the claim made is that state officials violated state rather than federal law. *Id.* 104 S.Ct. at 911.

This analysis demonstrates that the Court did not intend to bar federal court suits against state officials in their individual capacities. *Pennhurst* merely created a bar to federal court actions against state officials in those cases in which two conditions are met: (1) the claim is based on state rather than federal law, and (2) the action is otherwise one against the state. *Pennhurst's* ban on federal court actions is dependent on fullfillment of the latter condition. The analysis began by describing the criteria relevant to whether an action is one against the state and noting that the [513] plaintiffs conceded that theirs was such an action. *Pennhurst*, 104 S.Ct. at 908 &

n. 11. This part of the Court's analysis is superfluous if the Court intended to establish the source of law, state or federal, as the sole measure of the propriety of a federal court action. Thus, the analysis in *Pennhurst* gives no credence to a literal reading of the statement that "a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court." *Id.* 104 S.Ct. at 920; *see also Tate v. Frey*, 735 F.2d 986, 989 (6th Cir.1984) (per curiam) ("In *Pennhurst*, the Supreme Court concluded that a federal suit against state officials founded in state law contravenes the Eleventh Amendment *where the relief sought and ordered impacts directly on the state itself*) (emphasis added)

Further, the analysis in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the foundation upon which the language in *Pennhurst* was based, dispels any notion that *Pennhurst* meant to prevent suits against state officials in their individual capacities. In *Edelman* the plaintiffs alleged that state officials had withheld public assistance payments in violation of federal law. *Id.* at 653, 94 S.Ct. at 1351. The plaintiffs sought an injunction to require officials to grant wrongfully withheld benefits and to conform to federal law their future conduct. *Id.* at 653, 656, 94 S.Ct. at 1351, 1352. The prospective relief requested was not prohibited by the eleventh amendment. *Id.* at 664, 94 S.Ct. at 1356. Any monetary loss incurred by the state's adherence to a prospective injunction was "a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman*, 415 U.S. at 668, 94 S.Ct. at 1358; *see also Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

With respect to the claim for retroactive monetary relief, the Court noted that although the plaintiffs cast their claim as one for an injunction, "it is in practical effect indistinguishable in many aspects from an award of damages against the

State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action." *Edelman*, 415 U.S. at 668, 94 S.Ct. at 1358. Because the claim sought money damages from the state, it was barred by the eleventh amendment. *Id.* at 671, 94 S.Ct. at 1359. Thus, "Under *Edelman v. Jordan, supra*, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court." *Pennhurst*, 104 S.Ct. at 920. The holding in *Edelman*, however, like that in *Pennhurst*, is limited to cases in which the relief sought would "expend itself on the public treasury." *Dugan v. Rank*, 372 U.S. at 620, 83 S.Ct. at 1006. *Pennhurst* must be interpreted to mean that suits seeking money damages that are nominally against state officials, but that are in fact against the state, must be brought in state courts.

Support for the argument we advance is found in *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir.1984), which held that, "Neither *Edelman* nor *Pennhurst II* changes the well-settled rule that the eleventh amendment does not bar suits seeking damages for violation of federal law from state officials personally." *Id.* at 1150. *Pennhurst* neither discussed section 1983, which provides a cause of action against "every person" who under color of state law violates federal rights, not overruled *Scheuer v. Rhodes, supra*, which held that the eleventh amendment does not bar actions against state officials in their individual capacities. *Demery*, 735 F.2d at 1150. The court concluded:

> Because an interpretation of the *Pennhurst II* language that is consistent with both *Scheuer v. Rhodes* and decades of section 1983 jurisprudence is available, we decline to interpret *Pennhurst II* as having effectuated such a radical change in the established law of civil rights.

Id.; see also Banas v. Dempsey, 742 F.2d 277, 284 n. 10 (6th Cir.1984) ("The Eleventh Amendment does not bar actions for money damages arising from constitutional torts committed by state officials who are then sued in their individual capacities in federal [514] court.") We agree, and also note that *Davis v. Scherer*, —— U.S. ——, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), was decided subsequent to *Pennhurst*. The *Scherer* Court held that state officials sued for money damages in their individual capacities in federal court under section 1983 did not forfeit their qualified immunity by violating a state regulation. Such a holding was unnecessary if one takes literally the statement in *Pennhurst* that "a suit against state officials for retroactive monetary relief . . . must be brought in state court."

That finally brings us to the prison officials' claim that the eleventh amendment bars Spruytte's claim for declaratory and injunctive relief. *Edelman v. Jordan, supra*, clearly permits a federal court to award prospective injunctive relief against state officials when the claim is based on federal law. *Edelman*, 415 U.S. at 664, 94 S.Ct. at 1356; *see Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1066 (6th Cir.1984). If the officials are to prevail in their defense, it must be because Spruytte's claim is in essence a state-law claim and therefore barred by *Pennhurst*.

Although Spruytte's claim requires us to consider issues of state law, it does not follow that his claim is barred by *Pennhurst*. Spruytte's complaint alleges a violation of his *federal* constitutional rights. We decline to endorse the proposition that officials may undermine federal court authority by violating state as well as federal law. Even in *Pennhurst* the Court remanded the case to determine whether the state officials' conduct, the same conduct that formed the basis of the state-law claim, violated federal law. *Pennhurst*, 104 S.Ct. at 921. Moreover, subsequent to *Pennhurst* the Court entertained

a section 1983 action that required a close analysis of a state statutory scheme. *See Davis v. Scherer, supra.*

The dismissal of the complaint is reversed and the case remanded for further proceedings consistent with this opinion.

Costs of this appeal are awarded to appellant.

WEICK, Senior Circuit Judge, concurring in part:

In my opinion, the district judge abused his discretion in his *sua sponte* dismissal of Spruytte's *in forma pauperis* complaint filed under 42 U.S.C. § 1983 without allowing service of the complaint on the defendants and permitting Spruytte to amend his complaint or respond to the court's notice of intent to dismiss. I would reverse the judgment of the district court and remand for trial.

I would prefer this treatment of the case rather than to resort to the lengthy opinion of my learned and industrious colleague which contains many facts which are not part of the record, most of which are undoubtedly true.

FILED—MAR 27 1985
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD SPRUYTTE, Plaintiff-Appellant, v. RICHARD WALTERS AND RONALD SCHINK, Defendants-Appellees	NO. 82-1676

ORDER

BEFORE: MARTIN and JONES, Circuit Judges, and WEICK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

John Hehman /s/
John P. Hehman, Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD SPRUYTTE, Plaintiff-Appellant, v RICHARD WALTERS and RONALD SCHINK, Defendants-Appellees.	No. 82-1676

AFFIDAVIT OF KEVIN FORAN

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss

I, Kevin Foran, being sworn, say:

1. I am legal counsel for the Legal Editing Division of the Legislative Service Bureau, State of Michigan.

2. Pursuant to § 24(1) of the Administrative Procedures Act, MCLA 24.224(1); MSA 3.560(124)(1), an agency shall give notice of proposed guidelines to, among others, the Legislative Service Bureau.

3. Proposed guidelines are filed and reviewed by the Legal Editing Division of the Legislative Service Bureau.

4. On September 2, 1981, Department of Corrections Policy Directive PD-DWA-13.01 was received and time-stamped by the Legislative Service Bureau.

5. On April 19, 1982, Department of Corrections Policy Directive PD-BCF-63.03 was received and time-stamped by the Legislative Service Bureau. On August 17, 1982, Department of Corrections (amended) Policy Directive PD-BCF-63.03 was received and time-stamped by the Legislative Service Bureau.

6. This affidavit is made upon the records and files of the Legislative Service Bureau.

Kevin M. Foran /s/
Kevin Foran, Legal Counsel
Legal Editing Division
Legislative Service Bureau
Farnum Building, 3rd Floor
Lansing, Michigan 48909
(517) 373-0742

Subscribed and sworn to before me
this 6th day of February, 1985.

Sheila Jean Thompson /s/

Notary Public, Ingham County, Michigan
My Commission Expires July 6, 1987